ANDREW TONY MUTALE v CRUSHED STONE SALES LIMITED (1994) S.J. 98 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHAILA, JJ.S.
27TH SEPTEMBER, 1994
S.C.Z. JUDGMENT NO. 17 OF 1994
APPEAL NO. 31 OF 1994

Flynote

Assessment of damages - Special damages - When they should be paid - Whether they should be specifically pleaded in the statement of claim - Requirement for satisfactory proof of expenses before special damages can be awarded.

Headnote

The appellant was injured in a motor accident and, at a trial by the High Court, the respondent was found wholly to blame. An order for assessment of damages by the Deputy Registrar was made and accordingly the Deputy Registrar made such assessment on the 21st February 1994. Inter alia it was held that the appellant's medical expenses in Australia amounting to ten million foru hundred and forty thousand kwacha, and the cost of his air fare to and from Australia amounting to two million nine hundred and five thousand kwacha would be disallowed because they had not been pleaded as special damages in the statement of claim. The appellant appealed.

Held:

(i) The defendant was not prejudiced in any way and was fully aware that there would be a claim for the medical expenses incurred by the plaintiff before the case went to trial

(ii) There is need for satisfactory proof to be provided before special damages can be aawarded by the court.

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Cases referred to:

1. Bank of Zambia v Anderson and Anor 1993 S.C.Z. Judgement No. 13
2. Harrison v The Attorney General 1993 S.C.Z. Judgement No. 15

For the appellant: A M Bwalya Legal Aid Counsel
For the respondent: I C Ngonga of Ngonga and Co.

Judgement

GARDNER, J.S.: delivered the judgement of the court.

This is an appeal against an assessment of damages by the Deputy Registrar. There being no appearance on behalf of the respondent the appeal was heard under the provisions of rule 71(b) of the Supreme Court rules.

In this case the appellant was injured in a motor accident and, at a trial by the High Court, the respondent was found wholly to blame. An order for assessment of damages by the Deputy

Registrar was made and accordingly the Deputy Registrar made such assessment on the 21st February 1994. *Inter alia* it was held that the appellant's medical expenses in Australia amounting to ten million four hundred and forty thousand kwacha, and the cost of his air fare to and from Australia amounting to two million nine hundred and five thousand kwacha would be disallowed because they had not been pleaded as special damages in the statement of claim.

The first medical report indicated that the appellant suffered fifty per cent permanent disability of his leg and arm and that he had been treated for his injuries at the University teaching Hospital. There was further evidence that he had further treatment in Australia. The appellant gave evidence before the Deputy Registrar that he used to be a football player but now he could not play games and could not walk for along time either. He was unable to play tennis and badminton, which sports he used to take part in. He said his right arm was still very stiff and he experienced constant pain which made writing difficult. He said regarded himself now as cripple because he could not walk very far. As to his treatment in Australia, he said he was in hospital for one month.

In his assessment the learned deputy registrar disallowed the claim for special damages on the grounds that it was not included in the statement of claim. He awarded nothing for permanent disability and instead awarded damages for pain and sufering at the rate of K300 per week for 384 weeks for the period since the issue of the writ, making a total of K11,300,200. He awarded interest at the rate of 15 per cent for seven years totalling K120,960.00. The learned Deputy Registrar then went on "in arriving at the figure for costs I have among other things considered the period the plaintiff spent as an in patient in University Teaching Hospital. I therefore, make an award of K80,000.00."

Mr Bwalya, on behalf of the appellant, appealed against the disallowing of special damages. He conceded that they had not been set out in the statement of claim but he argued that, prior to the trial, there had been an attempt at settling the damages, and for that purpose, the full details of the appellant's expenses had been given to the respondent's advocates as set out in document 12 in the record of appeal, which was included in the bundle of agreed documents at the trial. He said that therefore the respondent had notice of the claim for special

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damages before the hearing of the case and was not taken by surprise. As to the damages awarded for the injuries, Mr Bwalya argued that these omitted damages for permanent disability and were so low that this court should interfere and reassess the damages according to the latest Supreme Court decisions. After questions by the court Mr Bwalya conceded that the purpose of the appellant's journey to Australia had been in order to attend an accountancy training course and he therefore conceded that the claim for the fare could not be supported; he insisted however, that the medical expenses in Australia were necessarily incurred as a result of the accident and as a result of the surgeon at the University Teaching Hospital having reported that, because the wound in the leg was infected, further treatment to the ankle could not be carried out at the University Teaching Hospital at that time.

With regard to the failure to include a claim for special damages in the statement of claim, Order 18 rule 12 (1A) of the White Book provides as follows:

(1A) subject to par. (18) a plaintiff in an action for personal injuries shall serrve with his statement of claim:
  (a) a medical report; and
  (b) statement of the special damages claimed.

The rest of the rule then provides that the court may order that such particulars shall be delivered within a specified time where the documents referred to are not served with the statement of claim.

The editorial note 18/12/1 of the White Book (1995 edition) sets out the functions of such particulars, namely, inter alia, to prevent the other side from being taken by surprise at the trial, and, under (6), to tie the hands of the party so that he cannot without leave go into any matters not included. In this connection there is comment that, if the opponent omits to ask for particulars, evidence may be given which supports any material allegations in the pleadings.

There is a further reason why a defendant should be made aware of the total damges to be claimed, and that is in order to give the defendant an opportunity to make a realistic payment into court.

In this case the claim in the statement of claim was set out as follows:

> "7. As a consequence on the injuries referred to in the preceeding paragraph the plaintiff has suffered general damages and special damages.
>
> PARTICULARS OF SPECIAL DAMAGES
>
> i. The plaintiff is no longer able to play his favourite sports namely: football, tennis and badminton
> ii. The plaintiff is no longer able to write properly, using his right hand
>
> AND THE PLAINTIFF CLAIMS
>
> i. damages for negligence
> ii. special damages
> iii. costs"

in the event therefore, at that stage no figures for medical expenses was drawn to the attention of the defendant. It might be argued that by referring to special

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damages the defendant was put on notice and should have called for particulars of such damages, but, in the manner in which the statement of claim was drawn, it was apparent that the advocates for the plaintiff thought that special damages referred to the loss of amenities as set out in the statement of claim. In view of the fact that at the relevant time medical treatment was free of charge in Zambia, there was no reason for the defendant's advocates to suppose that any special medical expenses were incurred. The fact that the words "special damages" were used in the statement of claim would not assist the plaintiff under the editorial note because the type of "special damages" was made clear in the statment of claim when reference was made to the plaintiff's loss of amenities. The fact that loss of amenities is covered by general damages and the wrong reference was made in the statement of claim does not affect the issue. The attention of the defendant was not drawn to the fact that medical expenses were incurred, consequently the statement of claim was defective in this respect.

It is therefore necessry to consider the effect of document 12 in the plaintiff's bundle of documents. This was a list of expenses incurred by the plaintiff and included the claim which we have referred to, for medical expenses in Australia. Although this document was put forward without projudice in the negotiations for a settlement the contents of the document itself are not without prejudice and there was nothing wrong it its inclusion in the bundle of documents in the court below. Although the special damages were belatedly drawn to the defendant's notice there is no doubt that, at the trial, the defendant was not taken by surprise nor was any attempt made to make the payment into court which would have been affected by lack of knowledge of the special damages.

The proper adherence to rules of court has been consistently urged upon parties by the courts of this country, but a failure, to follow strictly some rules of court should not necessarily bar a plaintiff from relief. It will be a question of fact in different circumstances whether such failure has prejudiced defendant, and, if so, whether such prejudice can be satisfied by the award of costs. In this case the defendant was not prejudiced in any way and was fully aware that there would be a claim for the medical expenses incurred in Australia before the case went to trial

In the circumstances therefore, both the learned trial judge and the learned Deputy Registrar were wrong in refusing to hear evidence of special damages.

We note from documents in the record of appeal, that it is apparent that the plaintiff was going to rely on the fact that the document to support the medical expenses had been stolen from him. In a case such as this, where mecial expenses were extremely high, no court could possibly entertain such a claim without seeing documentary evidence in support. The fact that the documents were stolen is sufficient ground for the acceptance of copies as the next best evidence, but is no ground for making an award for such expenses without adequate proof. Having regard to the order which we propse to make the plaintiff will have to produce adequate proof (by copies if necessary) before any award for special damages can be made.

In the past in Zambia it has not been the practice to serve a copy of a medical report with the statement of claim, but, in view of the provisions of Order 13 rule 12 (1A) this should be done in future, and, in default, an application can be made for the medical report to be provided. In this case, as the point was not taken at the trial, the failure to serve a copy of the medical report will not affect the award.

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With regard to the award for general damages, we comment at once that the awarding of damages for pain and suffering, over a fixed period, when there is continuing disability, and pain and suffering is not the correct method of dealing with such a case. Generlly damages for pain and suffering are calculated separately only in cases where there has been a definite period of pain and suffering which has ceased at some specific time. In such cases a definite calculation can be made at a rate appropriate to the rate of inflation at the time of the award. However, in cases such as the present one, where there is continuing pain and suffering and disability, no definite calculation of damages for pain and suffering can be made ever over any period and such damages are usually taken into account in a global award which is referred to as general damages. Furthermore, in this case the learned Deputy Registrar made an inexplicable order by taking into account the time spent by the plaintiff in the University Teaching Hospital in assessing the figure of K80,000.00 for costs. In the circumstances the entire approach to the award of general damages was wrong and the assessment is set aside. This court is now at large in assessing the appropriate damages.

The last case relating to damages for personal injuries dealt with by this court was Bank of Zambia v Anderson and Anor (1) 1993 SCZ Judgement No. 13. A reference to the damages

awards in that case will be useful in arriving at an appropriate figure for the damages to be awarded here.

In the Anderson case we set out the plaintiff's injuries as follows:

1. Ulcerating of the scalp with no fracture of the skull, resulting in concussion and retrogr amnesia extending to Christman 1986;l
2, Severe fracture of the right hemi-pelvis with a complete central dislocation of
3. Damage to right sciatic nerve;
4. A fracture to right sciatic nerve
5. Fractured ribs bilaterally; and
6. Damaged tendon in the right foot causing a permanent dropped foot.

We also indicated that the evidence showed that the plaintiff had had give operations including a hip replacement, that it was anticipated that she would require further two hip replacements and that, as a result of her injuries, the plaintiff could not take part in sports, she found it very difficult to talk, and, as a result of a permanent disability to the right hip and leg she had an ugly walk together with disfigurement from scars on her lower and upper leg together with wasting of the leg.

In the present case the first medical report provided after the accident indicated that the appellant suffered a compound fructure of the left ankle and a colles fracture of the right wrist. He was treated by closure of the wound to his leg and had manipulation under anaesthesia. The report went on "50 permanent disability inrespect of inclusion of left ankle. Stiffness of right arm and ..... Thirteen months later a further medical report from Australia read:

There has been:

He had been treated at the University Teaching Hospital February, 1995, after a Road Traffic accident when he sustained a compound fracture of the left ankle and colles fracture of the right wrist. His original case notes are missing but it is

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apparent that there was significant skin loss associated with the ankle injury and when the bones eventually healed they were in a poor position. He subsequently had an operation in Australia which partially improved the position. He still gets a lot of paid in the left ankle, especially when walking. this pain in partly relieved by wearing a specially made heavy orthopaedic boot.

Regarding the right wrist, he developed information of the tendons which caused prolonged stiffness and pain after the fracture had healed. To day he still has rotation of the forearm and pain at the base of the thumb after minor activities. This situation is unlikely to improve significantly in the future." The medical reports and other evidence therefore indicate that damages for pain and suffering and loss of amenities in the present case should be slightly less than half of those awarded in the Anderson case.

The relevant date of the award in the Anderson case was October,1992 and the High Court assessment in this case was in February, 1994. In the Anderson case for general damages at the rate applicable at the date of the award, taking into account pain and suffering and loss of amenities including the inability to participate sport and family activities, the possibility that the respondent would suffer because of her loss of earning capacity, the slight handicap of being unable to carry out house chores, which was mitigate by the employment of servants

but which was still a disability which was not suffered before the accident , the cosmetic disadvantages caused by the scars including the pronouncedly ugly lime and the doctriment to her married life, the award was four million five hundred thousand kwacha. The appropriate award for the appellant's pain and suffering and loss of amenities at the same date should, as we have said, be slightly less than half of that figure. The cases set out in Kemp and Kemp on the Quantum of Damage vol. 3 between pages 39601 indicate that the appropriate award after allowing for the difference between pounds and kwacha in respect of the injury to the appellant's ankle should, at the date of the Anderson award, have been one million two hundred and fifty thousand kwacha, and, for the wrist, based on the examples set out between pages 58351 and 58361 of the same volume, the award at that date, should have been seven hundred and fifty thousand kwacha making a total of two million kwacha. when we delivered our judgement in the Anderson case we said that we had noted that at the date of the award in that case the rate of exchange was appropriately K450.00 to the English pound. We emphasised however, that, while we would take this into account, it would not form the basis of any exact calculation. In the same way we note that, at the date of the assessment in this case, the rate of exchange was K1,000.00 to the English pound. Again we stress that we will not use this for an exact calculation of the amount that should be awarded to the appellant. As we indicated in the case of *Harrison v the Attorney General* (2) 1993 SCZ Judgement No. 16, when considering the change in the consumer price index between the date of one award and another it would be unrealistic to multiply later awards by the exact figures shown to be the difference in the price indices. In this case the figures supplied by the Central Statistics Office indicate that there was an increase of 27% in the consumer price index between the date of the Anderson award and the date of the award of this case.

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Bearing in mind the lowering the value of the kwacha which we have indicated the amount which should be awarded to the appellant in this case is three million two hundred and fifty kwacha for general damages.

For the reasons we have given the appeal is allowed; the award of the Deputy Registrar is set aside, and, in its place, judgement is entered in favour of the appellant for general damages in the sum of three million two hundred and fifty thousand kwacha.

The assessment of the special damages consisting of the cost of medical treatment in Australia is sent back to the Deputy Registrar subject to satisfactory proof of special damages being provided.

Costs to the appellant

Appeal allowed.

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